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In The
Supreme Court of the United States
October Term, 1985

JOHN V. EVANS, ROSE BOWMAN, GEORGE BACHIK and WILLIAM GRUZINSKI,
Petitioners,

v.

JEFF D., PAULA E., JOHN M. and DUSTY R., Minors, By and Through Their Next Friend CHARLES JOHNSON, III, Individually and on Behalf of the Class They Represent, and MARK CLARY, Intervenor,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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I. This Appeal Raises the Question of the Ethical Propriety of Simultaneous Negotiations and the Enforceability of Simultaneously Negotiated Settlement Agreements

Petitioners noted in their opening brief that this appeal has generated an unprecedented amicus response, in terms of emotional intensity. (Pet. Br. at 31). Respondents and their amici have now demonstrated the same emotional intensity on behalf of the plaintiff bar. Amici for Respondents argue that Petitioners are defending a "coerced waiver tactic" that amounts either to an "ingenious construction" of the civil rights statutes or to a "devious strategem" to evade those statutes with the ultimate design of having this Court "cripple private civil rights enforcement" throughout the nation. Brief of Amici Curiae NAACP Legal Defense and Educational Fund, Inc., et al. at 36 n. 21; 19; and 39 [hereinafter cited as NAACP Br.]. Similarly, Petitioners stand accused of running "afoul of the duty to maintain the integrity of the legal profession," failing to represent our clients "within the bounds of the law," prejudicing "the administration of justice," and misusing the might of government "to coerce a settlement that evades the law and is unjust." Brief of Amicus Curiae Committee on Legal Assistance of the Association of the Bar of the City of New York at 23, 31 and 40 [hereinafter cited as NYC Bar Br.].

The rhetorical excesses of Respondents' amici, on the issue of simultaneous negotiation of merits and attorney's fees, were not unexpected. What was unexpected is Respondents' assertion that the question of whether "this Court should . . . impose a complete ban on 'simultaneous

negotiation of both merits and attorney's fees in class action settlements'" is "simply not presented by the record or the ruling below." Resp. Br. at 12.

Respondents are alone in this understanding of the case. The District Court Decision and Order of August 12, 1983 (J.A. 111-112), clearly stated that the issue was whether "it is ethical for attorneys admitted to practice before this Court to negotiate a waiver of attorney's fees and costs concurrently with the merits of the claims."

The Ninth Circuit saw this case as "an example of problems that have arisen when class action settlement negotiations have been undertaken in conjunction with negotiation of attorney's fees." *Jeff D. v. Evans*, 743 F.2d 648, 649 (1984). The Ninth Circuit used the occasion to affirm that it "has followed the seminal decision of the Third Circuit in *Prandini* and has disapproved simultaneous negotiation of settlements and attorney's fees." *id.* at 652, and then held that "[a]ttorney's fees should not have been a part of the settlement of the claims of the class." *Id.* Any reservations the Ninth Circuit may have had against adopting a *per se* ban on simultaneous negotiations were immaterial to this case.

Finally, the Supreme Court granted the petition for *certiorari* on the question of "whether the Court of Appeals erred in holding it unethical for parties in civil rights class actions to negotiate a settlement on the merits simultaneously with a settlement of attorney's fees and costs." Petition at i.

Respondents' amici concur that the ban on simultaneous negotiation is the key issue, and their key goal, on appeal. One asserts that "we endorse fully the reasoning of the court below in banning simultaneous negotiations in

civil rights cases." NYC Bar Br. at 4. Both argue strenuously that this Court should impose the same *per se* ban on simultaneous negotiations nationwide. *Id.* at 43-64; NAACP Br. at 51-61.[1]

II. The Agreement In This Case Was Voluntarily Accepted, Not Coercively Extracted And, As Such, Was Properly Approved By The District Court

The briefs of Respondents and their amici have misstated the facts of this case in numerous instances. This section of the brief will address only the most important of the misstatements.[2]

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1. The national bar obviously reads *Jeff D.* as representing a ban on simultaneous negotiations. "The 9th Circuit, whose decision the Supreme Court has decided to review, has also ordered restrictions similar to those imposed by the 3rd Circuit [in *Prandini*]." *National Law Journal,* July 8, 1985 at S4. Similarly, the Third Circuit Task Force of judges and lawyers reviewing attorney's fees problems, stated: "The current status of *Prandini* is uncertain, however, because on May 13, 1985, the Supreme Court granted *certiorari* in *Jeff D. v. Evans,* 743 F.2d 648 (9th Cir. 1984), a case in which the Ninth Circuit specifically follows *Prandini.*" Report of the Third Circuit Task Force, *Court Awarded Attorney Fees,* draft of October 8, 1985 at 37 n. 97 [hereinafter cited as Third Circuit Report].

2. There is not sufficient space in this brief to provide interlinear corrections of all misstatements. To begin at the beginning, one would correct the allegations on page 1 of respondents' brief that the case concerns "a class of over 2,000 indigent children," and that "many of these children were confined . . . in out-of-state treatment institutions located thousands of miles from their homes and families." One would note that the respondent class, at any time, numbers in the dozens, not the thousands; that the class encompassed both indigent and non-indigent members; and that the vast majority of out-of-state placements were made to Good Shepherd Home in Spokane, Washington, a city some 30 miles west of the Idaho border, because that facility is closer to the homes of children in the Coeur d'Alene area than are facilities in southern Idaho.

Respondents' Argument begins with the assertion that, "This case concerns coercive requests for waivers in civil rights cases, not a per se rule barring simultaneous negotiation of the merits of attorney's fees." Resp. Br. at 12. More precisely, Respondents argue that the "narrow question for decision" posed by this case is:

> whether a court in a civil rights action in which only injunctive relief is sought, may enforce a complete waiver of plaintiffs' right to costs and attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, where the defendant on the eve of trial has conditioned a settlement offer providing substantial relief on the merits on that waiver.

Resp. Br. at 7-8. Narrow, indeed. Amici for Respondents echo this narrow question. According to one, the question is:

> whether defendants in a civil rights case may coerce a waiver of statutory fees by knowingly creating a conflict of interest for plaintiffs' counsel, pitting the clients' interest in relief on the merits against counsel's interest in a fee.

NYC Bar Br. at 10. The other offers, as the "Question Presented," the following:

> May a court, in determining post-judgment fee entitlement under 42 U.S.C. 1988 in a case in which only injunctive relief is sought, approve a coerced waiver of all attorney's fees sought by defense counsel on the eve of trial as a condition of providing relief on the merits through a consent decree?

NAACP Br. at i.

The questions are tautologous in their simplicity. Should a defendant spring a trap on the eve of trial?[3] Of

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3. Again, a complete rebuttal would demonstrate that, far from announcing the waiver condition "on the eve of trial,"

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course not. Should a defendant engage in unethical tactics designed to coerce a waiver of statutory fees? Of course not. Should a court approve a coerced waiver as part of a consent decree? Of course not. Petitioners and their amici have never suggested that this Court, or any other court, give its blessing to "coercive waiver tactics."[4]

The telltale omission from all three briefs by Respondents and their amici is this key sentence in the Ninth Circuit's opinion:

> During the negotiations, the defendants offered virtually all of the injunctive relief plaintiffs had sought, and *more than the district court during earlier hearings had indicated it was willing to grant.*

Jeff D. v. Evans, 743 F.2d at 649-50 (emphasis added). In other words, it misstates the record to contend that Petitioners requested a waiver of attorney's fees "as the price for agreeing to substantial relief on the merits." NAACP Br. at 23, n. 17; NYC Bar Br. at 35; Resp. Br. at 6. In fact, Petitioners, in most particulars, rejected plaintiff's allegations and proposed resolutions, but offered relief other than what plaintiffs had requested and *more than they were legally entitled to* had the case gone to trial.

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petitioners had made the same offer on six previous occasions spanning 24 months—and that Respondents had accepted the identical offer in the other half of this case. In fact, it was Respondents who discovered and announced their "ethical dilemma" for the first time "on the eve of trial."

4. It goes without saying that Petitioners are also not seeking "judicial approval of a coerced waiver of fees." NAACP Br. at 36 n. 21. Nor do they subscribe to the premise that Congress intended "to allow [defendants to coerce] plaintiffs to waive attorney's fees." *Id.* at 36 n. 22. Petitioners' brief at 11, said no such thing and amici for Respondents had no right to amend it.

The district judge, who had followed the disposition of pleadings in this case for two years, knew that every decision addressing the merits of this case had been decided in Petitioners' favor. Of the nine causes of action listed in Respondents' Complaint (J.A. 4-31), the Third, Fifth, Sixth, and Seventh Causes of Action were resolved in Petitioners' favor by summary judgment, as was the State law claim in the Second Cause of Action. In retrospect, the Ninth Cause was beyond the district court's jurisdiction, under this Court's subsequent decision in *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89 (1984). The Fourth and Eighth Causes of Action were settled with the education Defendants, and included a voluntary waiver of fees. The remainder of the Complaint—the First Cause of Action, and the federal law part of the Second Cause of Action—were not ruled upon by the Court in summary judgment on the ground that genuine issues of material fact remained to be resolved. A comparison of the causes of action and the allegations supporting them listed in the Respondents' Complaint with the Court's ruling on summary judgment (J.A. pp. 56-57), clearly indicates that almost one year before the trial date the bulk of the legal claims in this lawsuit had been resolved in the Petitioners' favor.

Even more important than his detailed familiarity with the legal merits of plaintiffs' allegations, the district court judge knew that defendants were dedicating the money forgone in attorney's fees to improve institutional conditions for the plaintiff class beyond the level legally required. The judge knew, for instance, that the governmental defendants had voluntarily expanded the class of beneficiaries to include not just the designated class of emotionally and mentally handicapped children, but also

those subject to proceedings under the Youth Rehabilitation Act and the Child Protective Act. Further, the judge knew that defendants had taxed their limited resources to set aside facilities at State Hospital North as a special care program for the plaintiff class.

It is thus unfair to assert that the district court judge in this case "erred by failing to make any independent determination under Section 1988 of the reasonableness of denying all fees in this case." Resp. Br. at 29-30. The judge carried out his responsibilities under F.R.C.P. Rule 23(e) by weighing the strength of plaintiffs' case against the gratuitous relief offered by defendants. He found a *quid pro quo* sufficient to support a waiver of attorney's fees. Against this background, he did not find any unethical conduct on the part of counsel for plaintiffs or for defendants. The district court's judgment in this respect was entitled to deference by the appellate court. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1980). Unfortunately, the Ninth Circuit, in its haste to ban all simultaneously negotiated settlements, failed to examine the reasoning of the district court.

The decision of the Ninth Circuit should be overturned and the decision of the district court judge should be reinstated. If the decision of the Ninth Circuit is not overturned, then the entire settlement agreement should be held void. Respondents' amicus argues that the fee waiver is severable from the merits portion of the agreement because it was not "an essential part of the agreed exchange." NYC Bar Br. at 45. No one familiar with the case would make such an argument. There was no severability clause in the settlement agreement. The parties

and the district court agreed that the fee waiver provision was a material, substantive provision without which there would have been no settlement. (J.A. 115-116). See Restatement (Second) of Contracts §§ 159, 161-62, 167, 170-71 (1981). Defendants had a right to expect plaintiffs' attorney to live up to his bargain when he promised to abide by his waiver of attorney's fees, "if so approved by the Court." (J.A. 104). Under substantially similar circumstances, the First Circuit denied attorney's fees to the attorney for a prevailing plaintiff who reneged on his bargain. *Lazar v. Pierce,* 757 F.2d 435 (1985).

Respondents seek to avoid this result with a semantic play on the phrase "court approval." Respondents contend that, in agreeing to the stipulation, they meant approval by *either* the district or the appellate court. Resp. Br. in Opposition to Petition for Writ of Certiorari at 7. The Ninth Circuit had no illusions on this score. The court held that, "Defendants correctly assert that plaintiffs' counsel did indicate willingness to forego fees if the court approved." *Jeff D. v. Evans,* 743 F.2d at 650. Unfortunately, the Ninth Circuit went on to hold that the general rule requiring parties to live up to their stipulations "has limited applicability" in the context of civil rights settlement agreements and consent decrees. *Id.*

This Court would surely not endorse that sentiment. Instead, if the decision of the Ninth Circuit is affirmed, the entire agreement should be struck down and the parties should be allowed to return to the bargaining table or to test the merits of their claims at trial.

III. The Alternatives Offered By Respondents Are Fatally Defective

Respondents and their amici present several alternatives for this Court's consideration in resolving the prob-

lems presented in this appeal. On closer inspection, the alternatives are remarkably similar. First, of course, is an outright endorsement of the *Prandini* approach, i.e., a ban on simultaneous negotiations of merits and fees and a mandatory "bifurcated approach to settlement" negotiations. NYC Bar Br. at 62-63; NAACP Br. at 60.[5]

Second, amici suggest that this "Court should instruct the lower courts to take prompt action when the parties seek assistance" during negotiations pursuant to Rule 16, including "the entry of *Lisa F.* orders barring simultaneous negotiations of fees and the merits." NAACP Br. at 61 n. 41. This second alternative is, of course, the same as the first, with the additional wrinkle that plaintiffs are free either to engage in simultaneous negotiations or to turn to the district court for a protective order banning such negotiations. Prompt entry of such orders, upon request by plaintiffs' counsel, is said to be "the minimum judicial action necessary to assure at least a measure of compliance with Congress' purposes in enacting the Fees Act." *Id.*

The third alternative makes explicit this "extra bargaining-chip" strategy. The Court is asked to announce a ban "at least against defense initiated fee waivers in the context of merits negotiations." *Id.* at 60. As in the second alternative, plaintiff retains the option of initiating fee discussions or insisting on an absolute ban on simultaneous negotiations.

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5. The only other alternative, according to the New York City Bar Association's Committee on Legal Assistance, is "direct active supervision by the federal district courts of settlement negotiations in these cases." NYC Bar Br. at 9. This "alternative" is proposed half-heartedly, and examined not at all. It functions, apparently, only to raise the *in terrorem* spectre of massive expenditures of "scant judicial resources." *Id.*

Finally, amici suggest an after-the-fact approach under which "the Court at the very least must direct lower federal courts to give *special scrutiny* to simultaneously negotiated settlements when parties seek court approval of settlements pursuant to Fed. R. Civ. P. Rule 23(e)." *Id.* at 60-61 (emphasis added). It is understandable, given the history of "special scrutiny" case law, why the plaintiff bar would find this approach appealing. This approach, as in the present case, would allow plaintiff counsel to engage in simultaneous negotiations, strike a package deal on both merits and fees, then ask the district court to bind defendants on the merits but rewrite the agreement on fees.

These four alternatives all suffer from the same defects. First, they all represent a radical departure from the present duties of parties and district court judges under the Federal Rules of Civil Procedure. They rest on the premise that civil rights actions are so "unique" that they require the enunciation by this Court of unique ground rules for negotiations and for district court approval of resulting settlement agreements.[6]

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6. The supposed "uniqueness" of civil rights actions is argued by Respondents and their amici. See Resp. Br. at 18 ("the unique ability of defendants in petitioners' position to exploit a conflict of interest between plaintiffs and their counsel"); NAACP Br. at 9 ("The nature of civil rights practice makes civil rights lawyers uniquely vulnerable to coerced waivers of fees"); NYC Bar Br. at 6 ("pitting plaintiff counsel's duty to the client against his or her interest in a fee . . . is a problem peculiar to civil rights practice"). As Petitioners have stated earlier, the problem of "pitting plaintiff counsel's duty to the client against his or her interest in a fee" is one that ethical counsel cope with every day of the week in every law office across the land. Pet. Br. at 34. For example, plaintiff attorneys in worker's

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There is nothing in the Fees Act to indicate a congressional intent that civil rights actions be treated under radically different rules from other civil actions. On the contrary, as this Court recently made clear, "There is no evidence, however, that Congress, in considering § 1988, had any thought that civil rights claims were to be on any different footing from other civil claims insofar as settlement is concerned." *Marek v. Chesny,* 87 L.Ed.2d 1, 10 (1985). It is not logically consistent to allow a simultaneous offer of settlement under Rule 68 in civil rights cases, but prohibit such an offer during negotiations aimed at settling the case.

Second, as mentioned in Petitioner's Brief, the proposals by Respondents and their amici are unenforceable. Pet. Br. at 29-30. The Third Circuit Task Force recently concluded that:

> enforcement of the *Prandini* rules is difficult because the trial judge does not know if the parties have discussed fee matters . . . . It is suspected that fee discussions do take place and that agreements on fees are withheld from the court until after the settlement is approved.

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compensation cases face the everyday ethical dilemma of whether to urge the injured client to accept an insurance carrier's lump-sum settlement (with immediate payment of a sizable contingency fee) or to accept a multi-year stream of payments, with the additional benefit of assured medical coverage (but with the risk of delay or total loss in recoupment of the contingency fee). Similarly, the lawyer must counsel a client whether to accept an offer of 10% whole-man disability (after only a day's work for the contingency fee) or to go to trial in hope of getting a 20% whole-man disability rating (at the cost of perhaps weeks of additional effort by the attorney). These ethical dilemmas, and others like them, are not unique to civil rights attorneys.

Third Circuit Report at 37-38. In short, there is "a belief that *Prandini* is not being honored." *Id.* at 38. It would be ironic in the extreme for this Court to impose the *Prandini* rule nationwide at the exact time when the Third Circuit has completed an exhaustive study of its eight-year experiment of living with the rule only to determine that, "the problems posed by its administration have led many Task Force members to conclude that its difficulties exceed its benefits." *Id.* at 39.

Third, the harsh fact is that the alternatives proposed by Respondents and their amici tend to benefit plaintiff lawyers at the expense of plaintiff clients. Again, the eight-year history of life under the *Prandini* rule in the Third Circuit is instructive:

> Prandini *may well tend to discourage settlement.* Most members of the Task Force believe that *Prandini* tends to discourage settlement in some cases and, on occasion, makes it impossible.

Id. at 38 (emphasis in original). The Task Force pinpointed the precise reason why the *Prandini* rule discourages settlements, as follows:

> By preventing agreement at the time settlement of the merits is discussed, *Prandini* makes it difficult for the defendant to ascertain precisely what its liability will be, thereby eliminating the very certainty that makes settlement attractive to the defendant.

Id.

The bottom line is that defendants will not settle unless they know the bottom line. In this regard, the suggestion by Respondents and their amici that fee claims may be revealed, but not discussed, during negotiation on the merits is counter-productive. NYC Bar Br. at 37; Resp.

Br. at 37. The most likely outcome of this procedure is that defendants who are forbidden to discuss and settle fees simultaneously with the merits will take that information and simply plug in the highest amount claimed for plaintiff attorney's fees and use it as a "cushion" for determining how much more money can be made available to the plaintiff class for relief on the merits. Once the defendant's maximum exposure is ascertained (but not discussed), there will still be an incentive for defendants to contest the attorney's fees. But any reduction in attorney's fees now will benefit the defendant, not plaintiff's clients. This system proposed by Respondents and their amici guarantees that their clients will be the inevitable losers.[7]

Finally, Respondents' proposals do not really solve the fundamental problems raised by this appeal. Petitioners are not unaware of or unsympathetic to the ethical dilemmas of the plaintiff bar. But, to a person, every governmental attorney contacted on this issue feels that the ethical problem posed by this appeal is that of plaintiffs, not defendants.[8] It cannot be unethical, they believe, for a

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7. Respondents and their amici are perhaps willing to sacrifice these near-term concrete losses for individual plaintiffs so that plaintiffs in general may enjoy the continued availability of legal counsel to vindicate their civil rights. The status quo is predicted to result in an exodus of attorneys willing to litigate civil rights claims. Resp. Br. at 18; NAACP Br. at 2 and 8; NYC Bar Br. at 2 and 26. These deductive and anecdotal predictions do not square with the empirical evidence, which suggests that civil rights cases are exploding exponentially. Pet. Br. at 16 n. 5.

8. The ethical problem for plaintiff's attorney in this case stemmed from the incompatible roles he attempted to play. First, the attorney attempted to function as counsel for the

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defense attorney to tell the truth, i.e., to announce the terms under which his or her client will settle a lawsuit.

Respondents' proposals do nothing to shake this perception and resolve on the part of the defense bar. This Court, by imposing a ban on simultaneous negotiations, can impose silence on defense attorneys and simply deny them the right to reveal the terms under which their client will agree to settle. But the Court cannot force a defendant to settle. In fact, the likely outcome of a rule banning simultaneous negotiations, as the Third Circuit has discovered, is that the parties will be forced into an elaborate guessing game. Plaintiffs, who are allowed to initiate discussions of fees, will guess until they find out by process of elimination what terms a defendant will insist on.

Worse yet, the parties will be forced to invent new games. For example, the defendant may avoid discussions of a fee waiver but insist that the agreement on the merits contain a stipulation that the plaintiff is not a "prevailing party." Quaere as to whether this does not simply push the "coerced waiver tactic" back one step.

The problem is that defendants are faced with a structural Catch 22. The moment they agree to settle, they confer "prevailing party" status on plaintiffs. But defendants simply will not pay blackmail, in the form of at-

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plaintiff case. Next the attorney had himself appointed guardian ad litem for that same class. Finally, after leaving Idaho Legal Aid for private practice, he bound himself by contract with that organization. Under these circumstances, the plaintiff class had no voice at all and the effective "client" was the attorney's employer. The "wedge" in this case was driven not by defendants' offer but by plaintiffs' attorney's attempt to wear three such ill-fitting hats.

torney's fees, to settle what they perceive to be nuisance lawsuits.

Respondents and their amici reply that a bright line exists between the "ordinary case" and cases that are "noncatalytic," or "truly frivolous" or "nuisance" in nature. NYC Bar Br. at 38-39; NAACP Br. at 45-47. Unfortunately, lawsuits do not come labeled in this fashion. Nor do defendants believe they have a veritable "arsenal of procedural devices available, both to dispose of truly frivolous cases and to obtain compensation for defending them." NAACP Br. at 47. The result, quite simply, is that defendants in such suits will go to trial if they cannot achieve a full settlement, including a waiver of attorney's fees. Nothing in Respondents' proposals before this Court can change this fundamental fact.

IV. Existing Procedures Suffice To Resolve The Problems Raised In This Appeal

In the last analysis, the Supreme Court must decide whether, as Respondents and their amici allege, unethical behavior on the part of governmental attorneys is so rampant throughout the country that the normal rules of civil procedure must be overhauled to cope with the abuse; or whether, as Petitioners and their amici suggest, any problems of abuse are but isolated instances that may be adequately dealt with under existing rules of civil procedure.

Respondents and their amici rely on anecdotal and undocumented evidence to support their allegation of widespread ethical misconduct on the part of the defense bar and resulting disillusionment on the part of *pro bono* coun-

sel for plaintiffs.[9] Similarly, they rely upon subjective and self-serving assertions as to the virtues of the per se rules they call upon this Court to promulgate: either a complete ban on simultaneous negotiations, or a ban at plaintiff's discretion, or a court review process skewed in plaintiff's favor under a "special scrutiny" ground rule.[10]

By contrast, Petitioners have turned to objective third parties, the presiding judges and their neutral, or at least balanced, study commissions in support of their contention that the vast majority of offers made by government attorneys during negotiations are made in good faith. See Pet. Br. at 35-36. Empirical evidence has been adduced for the proposition that present practice does not discourage the plaintiff bar. Pet. Br. at 16. An analytical framework was provided to demonstrate the essential incompatibility of Respondents' preferred alternatives with the fundamentals of "principled negotiations." Pet. Br. at

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9. For example: "We know of attorneys who have abandoned civil rights practice because of the widespread use of tactics such as those employed by the petitioners' attorneys in the present case." NAACP Br. at 17 n. 13.

10. Respondents and their amici argue that "approval of petitioners' approach would have the undeniable effect of removing fee entitlement from virtually all cases where plaintiffs prevail through settlements or consent decrees." NAACP Br. at 37. Support for this remarkable contention is found in the alleged admission by petitioners and their amici that "prevailing principles . . . require defense counsel to seek a waiver (not a compromise) of fees as part of any settlement in a civil rights case." *Id.* at 18. It is symptomatic of the paranoia of the defense bar that all three briefs purport to find this admission in the briefs of Petitioners and their amici. See Resp. Br. at 25; NAACP Br. at 18; NYC Bar Br. at 21-22, 43. Petitioners respectfully request the Court to peruse the citations offered as proof of this alleged admission. Not one of them supports the allegation. See Pet. Br. at 31-35; Br. of Alabama, et al., at 52-53; U.S. Br. at 23; City of New York Br. at 13.

26-28. Finally, the results of a comprehensive study have been presented showing that the only circuit with long-term experience under a per se ban on simultaneous negotiations has concluded that the ban is neither enforceable nor desirable. Third Circuit Report at 37-38.[11]

The conclusion is that the existing Rule 23(e) procedure, as applied to proposed consent decrees settling civil rights class action lawsuits, is not in need of drastic overhaul, but rather is adequate to deal with individual and systemic problems as they arise. Judicial scrutiny under Rule 23(e), subject to appellate review, provides a flexible tool for carrying out the goals of the Fees Act, as authoritatively construed by this Court in *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) ("a prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' "); and *Maher v. Gagne*, 448 U.S. 122, 129 (1980) ("fact that [plaintiff] prevailed through a settlement rather than through litigation does not weaken her claim to fees").

These principles must be applied by the district court in a case-by-case exercise of its Rule 23(e) powers. The factors to be considered include: the strength of plaintiff's case; the history of negotiations; the extent of relief offered; the likelihood of success at trial, *Manual for Complex Litigation* §§ 1.46 and 1.47 (1982); and, as correctly

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11. In fairness, it should be noted that the Third Circuit Task Force was not unanimous in concluding that a per se ban discourages settlement: "At least one member of the Task Force disagreed with the assertion that *Prandini* discourages settlement. The judges on the Task Force, however, were in agreement on this proposition." Third Circuit Report at 38 n. 101.

noted by Respondents and their amici, the immediacy of plaintiff's need and the impact of deliberate delay on that need.[12]

If this conclusion is unexciting, so be it. It is not the first time that this Court has reaffirmed basics as the means of carrying out the goals of the Civil Rights Act and the Fees Act. *Marek v. Chesny*, 87 L.Ed.2d 1 (1985).

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CONCLUSION

The facts of this case do not support the contention of Respondents and their amici that a "coercive waiver tactic" was employed. Rather, Petitioners offered a *quid pro quo* in exchange for the waiver of attorney's fees and had a right to expect plaintiffs' attorney to live up to his bargain when he promised to abide by a waiver of fees, "if so approved by the Court." The district court, after briefing and a hearing, approved the entire settlement

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12. In this regard, the final and most serious instance of Respondents' misrepresentation of the record cannot stand uncorrected. Respondents and their amici allege that their ethical dilemma was particularly cruel in this instance because any delay in accepting defendants' offer would subject their clients to possible sexual molestation and rape. Resp. Br. at 9, 19; NYC Bar Br. at 21. The fact is that these precise allegations were brought before the district court by plaintiffs in a motion for preliminary injunction; after extensive briefing, argument and investigation, the district court denied the motion for preliminary injunction and its allegation that plaintiffs were in a situation of imminent danger. This ruling, which was not challenged by plaintiffs' counsel in any manner, occurred a full year before defendants' offer of settlement. It cannot be relitigated on appeal.

agreement, including the fee waiver. The Ninth Circuit's reversal of that decision should be overturned and the judgment of the district court reinstated.

The objective evidence suggests that the problem of unethical governmental attorneys exacting "coercive waivers" is not widespread and that the existing rules of civil procedure can cope with it. There is no evidence to support the contention of Respondents and their amici that a new rule of civil procedure must be devised to cope with this narrow problem, or that any of their proposals would, in fact, improve the situation.

Respectfully submitted,

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